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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-873

PATRICK STAUNTON, ET AL., *Petitioners*

v.

JOSEPH L. DONAHUE, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the two lower courts reasonably concluded upon a sufficient evidentiary showing that, in violation of his right to freedom of speech guaranteed by the First Amendment of the United States Constitution made applicable to the States by the Fourteenth Amendment, Father Joseph L. Donahue was discharged by Illinois from his position as Catholic chaplain of the Manteno State Hospital because of his public criticism of conditions at that hospital, and that his public criticism did not detract from his ability to fulfill the requirements of his chaplaincy.

STATEMENT

Father Joseph L. Donahue was appointed Catholic chaplain at Manteno State Hospital on July 14, 1964, and served in that capacity until his discharge on December 4, 1969, nearly five and one-half years (Pet. A2). He ministered to the spiritual needs of the patients and employees at Manteno (*ibid.*). He also performed sundry other duties, including speaking at public functions to explain the operations of the hospital (*ibid.*). In his annual performance reviews preceding his discharge he was always rated "good" or "excellent" in seven separate categories of duties and responsibilities (Pet. A2-A3). In his most recent predischarge review, for the period from July 14, 1968 to July 14, 1969 (less than five months before his dismissal), his immediate superior praised his performance (A3):

> Father Donahue energetically and conscientiously discharges his duties as a spiritual advisor and counselor to the patients of Catholic faith at M. S. H. He has extremely favorable rapport with the patients to whom he provides the chaplaincy services, and at all times considers what is best for the patient.
>
> * * * * *
>
> Father Donahue constantly strives to bring about better conditions at M. S. H. and in doing so apprises the staff of changes that should be initiated in order to correct situations which are not acceptable for the care and treatment of the mentally ill. His ability to communicate with others concerning these problems and the presentation of his solutions leave little to misinterpretation. His strong initiative and precise communicating among employees and patients are attributes which make him an asset to M. S. H.

In the fall of 1969 Father Donahue publicly criticized hospital operations (Pet. A4). On October 20, 1969, a local newspaper carried a report of a critical speech he made (*ibid.*). On October 27, 1969, the same newspaper printed a letter to the editor he wrote criticizing a particular hospital program as impractical (Pet. A4-A5). On November 13, 1969, the same newspaper published a paid advertisement which he coauthored setting forth twelve specific incidents of negligence or improper activity at the hospital (Pet. A5). The advertisement charged that certain mental health officials were all "laymen" (*ibid.*). It assailed neglect in the preparation and funerals of the dead, want of effort to prevent runaways and improper treatment, and delay in treatment (*ibid.*). It questioned the legality of a self-medication program and asserted that the hospital lacked certain facilities (*ibid.*). It charged that untidy patients were mixed with tidy patients and that birth control pills were issued to highly promiscuous patients (*ibid.*). It recounted other incidents of neglect (*ibid.*).

Many of Father Donahue's accusations came from reports of the "Pharmacy & Therapeutics Committee Meetings" at the hospital and other inter-office memoranda (Pet. A5). Furthermore, as Father Donahue testified, he checked every charge he made either by direct observation, conversation with "reliable sources, doctors, nurses, security men and aides," or through a number of memoranda which came to his office (*ibid.*). Finally, as he testified, he never knowingly published or stated anything that was false (*ibid.*).

Because of his criticism of the hospital, Father Donahue was dismissed as chaplain on December 4, 1969 (Pet. A6, A2). He brought an action seeking

redress. The District Court found that "undesirable conditions did exist" at the hospital; that, "properly distressed" by these conditions, Father Donahue publicly criticized them; that his "public discussions relating to the existing conditions" were "proper and within the rights guaranteed under and protected by the First and Fourteenth Amendments to the United States Constitution"; that, "as a result of . . . speaking forth," Father Donahue was discharged; and that his discharge violated his rights under the First and Fourteenth Amendments (Pet. A26). The District Court entered a judgment ordering that Father Donahue be offered "full and unconditional reinstatement to his position as Catholic Chaplain at Manteno State Hospital . . ."; that he be indemnified for his "out-of-pocket expenses" resulting from his discharge; that, because of the "emotional harm, degradation and humiliation" he suffered (Pet. A27), he be paid $2,000; and that he be allowed attorney's fees in the sum of $750 (Pet. A29-30).

The Court of Appeals affirmed the judgment with immaterial modifications (Pet. A31). It identified the "principal issue" as Father Donahue's "First Amendment right to freedom of speech" (Pet. A6), and it addressed that issue in the light of the standard enunciated by this Court in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) (Pet. A8). It quoted this Court's approach: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" (Pet. A10). It listed the factors which comprise the State's interest (*ibid.*).

It observed that the only part of Father Donahue's office that possibly implicated these interests was speaking at public functions to explain hospital operations (*ibid.*). It discounted this activity as a marginal part of his position; it was not even evaluated until May 13, 1969, and Father Donahue's performance in it was then rated "good" (*ibid.*). Viewed in totality, the Court of Appeals appraised this part of his work as not "such a critical responsibility of a Chaplain as to give the State a strong enough interest to interfere with . . . [Father Donahue's] free speech rights" (*ibid.*). Focussing rather on the central aspect of his office, the Court of Appeals determined that it had not been shown that Father Donahue's public criticism "hindered him in the performance of his religious and spiritual duties toward the patients at Manteno" (*ibid.*). Accordingly, finding that nothing in his chaplaincy significantly suggested that silence was exactable of him as an employee, and finding further that Father Donahue "reasonably believed" his public criticism "to be true" and that it was "not knowingly false and recklessly made" (Pet. A7), the Court of Appeals concluded that the societal and individual interest in speaking out "on matters of public concern, such as mental health," outweighed any claim for suppression that the State had made as an employer (Pet. A11).

ARGUMENT

1. In *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), this Court fashioned the standard to be applied, and identified the competing interests to be evaluated, in determining whether an individual's right as a citizen to speak should be subordinated because his public criticism is said to collide with the discharge

of his job responsibilities as a governmental employee. The two courts below, correctly understanding the *Pickering* standard, applied it faithfully and sensitively. The situation to which the standard was applied is highly individualistic and the factors evaluated quite particularized and special. Given the unexceptionable perception of the controlling standard, and the concurrent determination of the two lower courts in applying it in discrete circumstances, no question is presented meriting review by this Court. "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948).

2. Petitioners play a number of variants on the theme of their asserted want of "bad faith." None merits this Court's review.

(a) To avoid answerability for abridging Father Donahue's First Amendment rights, Petitioners assert that they acted in good faith (Pet. 16-19). The argument founders on the finding that "defendants acted in bad faith . . ." (Pet. A13). Accordingly, there is no factual predicate for their argument.

To escape this barrier to their argument, Petitioners assert that the finding of bad faith was not made by the District Court, but by the Court of Appeals, and that the Court of Appeals lacks power to make findings (Pet. 27-29). But the Court of Appeals held that the finding existed as a "necessary implication" of the District Court's decision and judgment (Pet. A12 and n. 4). Furthermore, a Court of Appeals may decide the merits of an appeal in the absence of an explicit finding " 'if a full understanding of the question pre-

sented may be had without the aid of separate findings.'"[1] It may in its discretion either remand to the *nisi prius* trier to supply an arguably omitted finding, or it may decide the appeal without a remand if it believes that it is sufficiently informed of the factual posture of the controversy by the record as it exists. Whether, on a particular record, a Court of Appeals should exercise its discretion one way rather than another presents no question warranting this Court's review.

(b) Petitioners principally assert that they may discharge Father Donahue for speaking out so long as they act in good faith (Pet. 16-19). They say that a governmental employee's protection depends on a showing, not only that his governmental employer infringed his free speech rights, but that the employer committed the abridgment in bad faith. Their argument is barred by, and requires disregard of, the finding that they did act in bad faith. This aside, their argument is devoid of any merit. Repression of free speech is not justified because the suppressor's motive is pure. "It is of no consolation to an individual denied . . . [a constitutional right] that it was done in good faith." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

(c) Petitioners secondarily assert that, even if they are subject to equitable relief, their good faith shields them from answerability in damages for the harm they caused (Pet. 27). The argument is again barred by the bad faith finding. And, bad faith aside, it again has no merit. When abridgment of a constitutional or statu-

[1] 5A Moore's Federal Practice ¶ 52.05[2], pp. 2720-2721 (1971); *Huard-Steinheiser, Inc.* v. *Henry*, 280 F.2d 79, 84 (C.A. 6, 1960).

tory right inflicts injury, compensation in damages to right the wrong is grantable as a matter of course.[2] It is frivolous to assert that the innocent victim of unconstitutional action should bear his own loss because the perpetrator of the wrong is pure in heart.

(d) Finally, Petitioners assert that, whatever may be true of compensatory damages, their good faith precludes recovery of punitive damages (Pet. 20, 27), and on that basis they protest the award of $2,000. But they grant that bad faith would justify punitive damages (Pet. 20), so that their argument is once more foreclosed by the bad faith finding. Furthermore, their argument is fundamentally flawed for another reason. While the judgment in the sum of $2,000 was denominated punitive (Pet. A28, A29, A12), this is a misnomer. The judgment was based on the finding that, "as a direct consequence of the defendants' acts, the plaintiff, Joseph L. Donahue, did suffer damages for emotional harm, degradation and humiliation in the amount of Two Thousand Dollars ($2,000.00)" (Pet. A27). Father Donahue thus recovered $2,000 to compensate him for mental distress and indignity, and recovery for such harm is compensatory, not punitive.[3] Accordingly, no question is presented concerning a sufficient basis for recovering punitive damages.

In sum, Petitioners play variations on the theme of their asserted good faith, but the merits of their argu-

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[2] *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 395-397 (1971); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 238-240 (1969); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).

[3] McCormick, Damages, 315-316 (1935); Restatement, Contracts, § 342, Comment a (1932); 22 Am. Jur. 2d, Damages, § 197 (1965).

ments cannot even be reached without first displacing the finding of bad faith. Furthermore, even were the finding penetrable, nothing is presented warranting review.

3. Petitioners claim that the decision below conflicts with *Jenson* v. *Olson*, 353 F.2d 925 (C.A. 8, 1965) (Pet. 22). No conflict exists. *Jenson* antedated this Court's decision in *Pickering*, and the hegemonic role that *Jenson* ascribed to the government as employer was repudiated by *Pickering*. Accordingly, the Court of Appeals in this case correctly found "*Jenson* to be unpersuasive, mainly because it no longer represents the prevailing thought in this area. See *Keyishan* v. *Board of Regents*, 385 U.S. 589 (1967) and *Pickering* v. *Board of Education*, 391 U.S. 563 (1968)" (Pet. A8). Petitioners are simply unreconciled to their obligation to respect the free speech rights of their employees.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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